



- Consultation response -

## **Europex response to the ESMA consultation on the review of the Market Abuse Regulation (MAR)**

Brussels, 29 November 2019 | Europex, the Association of European Energy Exchanges, welcomes the initiation of the MAR review and would like to use this opportunity to underline the importance of the MAR policy objectives. A robust and coherent regulatory framework to combat market abuse is necessary to help safeguard the integrity of financial markets and provide clarity to market participants as well as market infrastructure providers.

A number of principles underpin our response to this review, including the need to ensure coherence between MAR and other pieces of legislation such as the Benchmarks Regulation (BMR) and the Regulation on wholesale energy market integrity and transparency (REMIT), a framework designed specifically to combat market abuse in energy commodity trading.

We further support ESMA's efforts to improve cross-market surveillance, which we consider a valuable tool to help combat market abuse. European exchanges have gained significant experience in this area and are always ready to cooperate with ESMA, ACER and others to ensure an effective surveillance framework is in place.

### **Definition of benchmark in MAR**

**Q3: Do you agree with this analysis? Do you think that the difference between the MAR and BMR definitions raises any market abuse risks and if so what changes might be necessary?**

It is important to have a consistent, coherent and aligned EU regulatory framework for market abuse and the regulation of indices. Policymakers should therefore coordinate their activities with respect to the ongoing review of MAR and the BMR.

Europex agrees with ESMA's analysis of the differences in scope between the definitions of a benchmark in MAR and the BMR. ESMA is right to raise these differences as a potential risk. Europex suggests making use of one single definition for both regulations, whereby MAR should reference the established BMR benchmark definition. The use of a single definition as set out in the BMR provides for enduring consistency between both regulations.

## **Sanctions against (attempted) benchmark manipulation and powers of NCAs**

**Q4: Do you agree that the Article 30 of MAR “Administrative sanctions and other administrative measures” should also make reference to administrators of benchmarks and supervised contributors?**

There is a fundamental difference between the activities covered under MAR and the BMR. MAR establishes a common regulatory framework against market abuse and defines measures to prevent it, whilst the BMR sets out governance and control requirements for those involved in the benchmark determination process. As the BMR does not contain rules on market abuse, Europex believes that it is important to include relevant actors involved in the benchmark determination process in the anti-market abuse framework of MAR, including benchmark administrators and supervised contributors. Importantly, however, and in order to avoid double regulation, benchmark administrators who exclusively offer regulated data benchmarks should not be included. Europex further agrees that attention should be paid to the corresponding administrative sanctions and measures within the BMR when considering modifications to Article 30 of MAR to ensure the actions that may be taken are clear to participants.

**Q5: Do you agree that the Article 23 of MAR “Powers of competent authorities” point (g) should also make reference to administrators of benchmarks and supervised contributors? Do you think that is there any other provision in Article 23 that should be amended to tackle (attempted) manipulation of benchmarks?**

With reference to our response to Q4 of this consultation, Europex agrees with ESMA’s suggestion to extend point (2)(g) of Article 23 to include administrators of benchmarks and supervised contributors. To avoid double regulation, benchmark administrators who exclusively offer regulated data benchmarks should, however, not be included.

**Q6: Do you agree that Article 30 of MAR points (e), (f) and (g) should also make reference to submitters within supervised contributors and assessors within administrators of commodity benchmarks?**

In line with our response to Q4 of this consultation, Europex agrees with ESMA’s suggestion to make reference in Article 30 of MAR to submitters within supervised contributors and assessors within administrators of commodity benchmarks.

Europex considers that relevant persons involved in the benchmark determination process need to be covered by this article, including all relevant persons within a supervised contributor and, for administrators of commodity benchmarks, all persons involved in the assessment process.

To avoid double regulation, benchmark administrators who exclusively offer regulated data benchmarks should, however, not be included.

## **Definition of inside information and its effectiveness in preventing market abuse**

**Q13: Have market participants experienced any difficulties with identifying what information is inside information and the moment in which information becomes inside information under the current MAR definition?**

It should be noted that for energy derivative contracts, a tailor-made regime for combatting market abuse already exists, namely REMIT. The definition of inside information in REMIT (Article 2(1)) is designed particularly for wholesale energy products and is sufficient, well-suited and fit-for-purpose for comprehensively combatting market abuse in energy commodity trading, including in energy derivatives.

As the definition in MAR is generally wider than the REMIT definition, we recommend maintaining the definition unchanged. Should policymakers still decide to amend or further specify the definition of inside information in MAR, then it should, for electricity and gas markets, be more closely aligned with REMIT and certainly not diverge to avoid legal uncertainty.

**Q14: Do market participants consider that the definition of inside information is sufficient for combatting market abuse?**

Please refer to our response to Q13.

## **Inside information for commodity derivatives**

**Q16. Have market participants identified inside information on commodity derivatives which is not included in the current definition of Article 7(1)(b) of MAR?**

In energy markets, and possibly also other commodities markets, the price formation may be impacted by, for example, political decisions. By way of example, information related to changes in the EU Emissions Trading System (EU ETS) impacting the price of emission allowances may clearly influence electricity and gas prices as they are partly interdependent. Information on “firm” upcoming changes to the EU ETS will clearly constitute inside information under MAR 7(1)(c), which defines inside information in relation to emission allowances.

However, since such information only entails a trading (and disclosure) prohibition and not an active information obligation, it will not necessarily be covered by Article 7(1)(b) of MAR,

as this definition includes the criterion of *“and where this is information which is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets”* in order to constitute insider information. The point is that such information is not necessarily expected/required to be disclosed: this will depend on the relevant rules on disclosure obligations.

One possible clarification would be to separate the reference in Article 7(1)(b) of MAR to information expected or required to be disclosed from the rest of the definition and replace the word “and” with “in particular”. This would mean that the last part of the current definition would no longer be cumulative, thus allowing the 7(1)b definition to cover information that is not expected/required to be disclosed, but which nonetheless could impact electricity and gas prices. This would also bring the MAR definition in 7(1)(b) more in line with the definition in REMIT where the relevant part of the defined term “information” in Article 2(1)(a-d) of REMIT is indeed non-cumulative.

**In view of the above, Article 7(1)b of MAR could be amended as follows:**

*(b) in relation to commodity derivatives, information of a precise nature, which has not been made public, relating, directly or indirectly to one or more such derivatives or relating directly to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts, ~~and~~ **in particular** where this is information which is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets;*

**Please see below Article 2(1)(a-d) of REMIT for reference:**

*(1) ‘inside information’ means information of a precise nature which has not been made public, which relates, directly or indirectly, to one or more wholesale energy products and which, if it were made public, would be likely to significantly affect the prices of those wholesale energy products.*

*For the purposes of this definition, ‘information’ means:*

*(a) information which is required to be made public in accordance with Regulations (EC) No 714/2009 and (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations;*

*(b) information relating to the capacity and use of facilities for production, storage, consumption or transmission of electricity or natural gas or related to the capacity and use of LNG facilities, including planned or unplanned unavailability of these facilities;*

*(c) information which is required to be disclosed in accordance with legal or regulatory provisions at Union or national level, market rules, and contracts or customs on the relevant wholesale energy market, in so far as this information is likely to have a significant effect on the prices of wholesale energy products; and*

*(d) other information that a reasonable market participant would be likely to use as part of the basis of its decision to enter into a transaction relating to, or to issue an order to trade in, a wholesale energy product.*

*Information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence, or an event which has occurred or may reasonably be expected to do so, and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of wholesale energy products;*

**Q17. What is an appropriate balance between the scope of inside information relating to commodity derivatives and allowing commodity producers to undertake hedging transactions on the basis of that information, to enable them to carry out their commercial activities and to support the effective functioning of the market?**

We believe that the balance is currently well addressed, for the markets in scope of REMIT. REMIT Recital 12 provides clear guidance for the interpretation of MAR 7(1)(b) when applied to these markets.

Please see below Recital 12 of REMIT for reference:

*(12) The use or attempted use of inside information to trade either on one's own account or on the account of a third party should be clearly prohibited. Use of inside information can also consist in trading in wholesale energy products by persons who know, or ought to know, that the information they possess is inside information. Information regarding the market participant's own plans and strategies for trading should not be considered as inside information. Information which is required to be made public in accordance with Regulation (EC) No 714/2009 or (EC) No 715/2009, including guidelines and network codes adopted pursuant to those Regulations, may serve, if it is price-sensitive information, as the basis of market participants' decisions to enter into transactions in wholesale energy products and therefore could constitute inside information until it has been made public.*

**Q18. As of today, does the current definition of Article 7(1)(b) of MAR allow commodity producers to hedge their commercial activities? In this respect, please provide information on hedging difficulties encountered.**

Please refer to our response to Q17.

**Q19. Please provide your views on whether the general definition of inside information of Article 7(1)(a) of MAR could be used for commodity derivatives. In such case, would safeguards enabling commodity producers to undertake hedging transactions based on proprietary inside information related to their commercial activities be needed? Which types of safeguards would you envisage?**

The current regime is fine and a necessary prerequisite for the well-functioning of energy commodity derivatives markets.

### **ESMA's initial considerations as regards the cross-market order book surveillance framework**

**Q66: Please provide your views on the abovementioned harmonisation of reporting formats of order book data. In addition, please provide your views on the impact and cost linked to the implementation of new common standards to transmit order book data to NCAs upon request. Please provide your views on the consequences of using XML templates or other types of templates.**

Europex supports the general objective to enhance the ability of regulators to monitor markets for market abuse. However, we strongly oppose the harmonisation of the reporting formats for order book information if that harmonisation implies a newly created reporting stream in addition to the already existing supervisory reporting streams.

We would nevertheless support a harmonisation of the reporting formats for order book information if that harmonisation is strictly based on and limited to the order reporting format as established by ACER under REMIT. This harmonisation should be applied to orders subject to Article 16(2) of MAR where *“Any person professionally arranging or executing transactions shall establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders ...”*. Article 16(5) provides authority for this, but requires cooperation with ACER under Article 25(3): *“Competent authorities and ESMA shall cooperate with the Agency for the Cooperation of Energy Regulators (ACER), established under Regulation (EC) No 713/2009 of the European Parliament and of the Council, and the national regulatory authorities of the Member States to ensure that a coordinated approach is taken to the enforcement of the relevant rules where transactions, orders to trade or other actions or behaviours relate to one or more financial instruments to which this Regulation applies and also to one or more wholesale energy products to which Article 3, 4 and 5 of Regulation (EU) No 1227/2011 apply.”*

**Q67: Please provide your views on the impact and cost linked to the establishment of a regular reporting mechanism of order book data.**

Europex is strongly opposed to the mandatory reporting of order information. The costs of implementing such a regime would be onerous not only to market participants, who would be obliged to pass these costs on to the final consumer, but also to supervisors who would have to indirectly charge the taxpayer. As a matter of fact, the current regime already requires the reporting of transactions, commodity derivative positions, financial instrument data and turnover information by investment firms and trading venues.

For example, for ICE Futures Europe this represents the submission of between two to five million records every business day with individual file size limits of one and two million records. ICE Futures Europe currently receives around three hundred million orders each day with peaks that are triple this figure. The current reporting infrastructure of both the venue and that of its regulators would require a complete redesign and would need to be rebuilt if order reporting was to be made mandatory. We therefore strongly question whether mandatory order reporting is the most cost-effective method of addressing this supervisory issue.

In addition, we would like to highlight that with the current evolution of algorithmic trading programmes replacing human trading, the ratio of orders to trades is likely to increase and that the figures mentioned above are likely to continue to rise and be representative of many trading venues in a few years' time. Order reporting would result in a massive increase in the amount of personal information being transmitted across the EU, including the need to adequately encrypt, decrypt and protect such data.

**Q68: In particular, please: a) elaborate on the cost differences between a daily reporting system and a daily record keeping and ad-hoc transmission mechanism; b) explain if and how the impact would change by limiting the scope of a regular reporting mechanism of order book data to a subset of financial instruments. In that context, please provide detailed description of the criteria that you would use to define the appropriate scope of financial instruments for the order book reporting.**

a) Europex believes that maintaining the current system of order retention and selective requests from competent authorities is the most cost-effective solution. Blanket daily reporting of all orders would overwhelm the regulatory databases and reporting systems with huge amounts of data from markets that have been performing in full compliance with the market conduct regulations. Again, this would indeed be a very costly solution.

b) We do not think that this option is particularly practical. Basic psychology will cause any potential market abuser to shift towards the sectors that are under less scrutiny. Limiting reporting of a subset will most likely concentrate abuse in the sectors not subject to reporting, thereby significantly diminishing the chances of the regime to detect abuse. Also, many markets are inter-connected, and only reporting a specific sector will be of limited usefulness.

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